Cur. Adv. Vult.

Briggs, J. [delivering oral judgment, said]: — This is an appeal against sentence only, and has caused me some difficulty. The appellant was in the first place convicted in April, 1952, of possession of a substantial quantity of chandu and implements for smoking chandu, a quantity which, in my view, clearly indicated that he was more than a mere addict. It was his first offence, and the learned President, driven to such a course by the extraordinary provisions of the Proclamation, which do not permit of a fine for this offence, bound the appellant over for six months in the sum of $500 with one surety. Just before the bond had expired, the appellant was again arrested and charged with consumption of chandu, and permitting the use of premises for the consumption of chandu. Of these two charges, the first was stayed under section 171 of the Criminal Procedure Code, and on the second charge he was fined $500, or in default four months imprisonment. That appears to me to be a light sentence for an offence which presumably involved trafficking in chandu smoking for motives of gain. After this second conviction the accused was called on to come up for judgment under the bond. He could give no good reason for his breach of bond and was sentenced to four months rigorous imprisonment. From that sentence he now appeals.

Although he was dealt with lightly in the first place and, as I think, lightly on the second conviction, I consider this sentence of four months rigorous imprisonment was a definitely heavy one. In assessing sentence I think the Court should, in these circumstances, look back to the offence for which the accused was bound over, and sentence as for that offence in the circumstances which then obtained, so that if at that time the accused was a first offender, which in the event of binding over would almost invariably be the case, he must still be sentenced as if a first offender when called up on his bond, although in fact the second offence has since been committed. If there is to be severity over a repetition of the offence, it should be shown in the sentence for the second offence and not in the deferred sentence for the first. The second sentence is not now before me, but I think that the deferred sentence for the earlier offence, considered on this principle, was excessive.

I should be perfectly prepared to deal with this matter by a heavy fine if the law allowed me to do so, or at most by a heavy fine and a nominal sentence of imprisonment. I can no longer regard this as a matter which can be met by a bond, and therefore imprisonment for some period is the inevitable result; but having regard to the grave effect on the appellant's practice as a dentist, and to the further fact that he is not in the ordinary sense a habitual offender, I think that a short term will satisfy the law's requirements. I reduce the sentence from four months' rigorous imprisonment to fourteen days simple imprisonment.

It has been suggested to me that in addition the bond might be estreated. That would, however, if I were to do it, merely be a device for fining the accused in addition to giving him a sentence of imprisonment, and I do not wish to do that, as I think the cases in which both fine and imprisonment should be inflicted for the same offence are exceedingly rare, and this is not one of them. The appeal will accordingly be allowed to the extent I have indicated.

Order accordingly.

CHENG DECK KIM v. PUBLIC PROSECUTOR.

[A. Cr. J. (Briggs, J.) March 13, 1953]

[K.L. — Criminal Appeal No. 16 of 1953]

Emergency Regulations, 1951, reg. 17EA(5) — Restricted article — Removing restricted article from food restricted area — Proof of movement of restricted article out of restricted area.

A person found with a restricted article is not committing an offence under the Emergency Regulations, 1951, Reg. 17EA(5). There must be proof of movement of the restricted article out of a restricted area.

CRIMINAL APPEAL.

J. S. H. Skrine for the appellant.

G. C. Bryne (Federal Counsel) for the respondent.

Briggs, J.: — The appellant was charged with removing certain rice, being a restricted article, from a food restricted area. There was evidence that he was arrested at "Sungei Pinang old railway line going back to Banting". This does not appear to me a clear description of any specific locality, but it might possibly be clear to anyone having local knowledge of the Klang area. The Klang Town Board area is declared a food restricted area. I understand that Sungei Pinang is within the Klang Town Board area. If this is the case, there was evidence that the rice was in the food restricted area, but no evidence that it was moved out of it. On the other hand, if the place of arrest is outside the food restricted area, there is no evidence that it was ever moved from that area, to the place of arrest. In either case the conviction is obviously bad. The prosecution have clearly failed to appreciate what evidence is necessary to prove a charge under Emergency Regulation 17EA(5). The learned Magistrate's note is defective in not showing who conducted the prosecution. The learned Deputy Public Prosecutor did not ask for a retrial. I allowed the appeal and set aside the conviction and sentence.

Appeal allowed.